

Gateway Freight Services, Inc. and Allied Services Division, Transportation Communications International Union, AFL-CIO-CLC. Case 13-CA-29889

April 9, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On August 21, 1992, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The Charging Party filed exceptions to the judge's decision and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The Respondent's request that the Charging Party's exceptions be rejected lacks merit and is denied.

Richard Andrews, Esq. and Aaron Karsh, Esq., for the General Counsel.

James E. Moye, Maria Sorolis, and John O'Rourke, Esqs., for the Respondent.

Robert Bloch, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried at Chicago, Illinois, on October 2 through 4, 1991, and January 6 through 9, 1992. On November 28, 1991,¹ Allied Services Division, Transportation Communications International Union, AFL-CIO-CLC (the Union) filed a charge against Gateway Freight Services, Inc. (the Respondent) alleging violations of Section 8(a)(1) and (3) of the Act. On January 4, 1991, the Union filed a first amended charge alleging violations of Section 8(a)(1), (3), and (5) of the Act by Respondent. The complaint and notice of hearing issued on April 29, 1991.

¹All dates are in 1990 unless otherwise indicated.

The complaint alleges that, inter alia, Respondent failed and refused to hire certain employee applicants of Ogden Maintenance Cargo Services, Inc., the predecessor employer, whose employees were represented by the Union for purposes of collective bargaining. Counsel for the General Counsel's theory is that certain of these employee applicants were not hired because of their union affiliation, and to avoid a successorship obligation by failing to recognize and bargain with the Union as the exclusive representative of Respondent's employees engaging in air cargo handling at Respondent's Chicago facilities. Furthermore, Respondent is alleged to have unilaterally changed terms and conditions of employment without prior notice to the Union. During the recess in the hearing counsel for the General Counsel's motion was granted to allege additional discriminatees by name, and to allege an alternate bargaining unit theory.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs,² I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material here, Respondent, a corporation with offices and places of business in Los Angeles, California; Boston, Massachusetts; Honolulu, Hawaii; Seattle, Washington; San Francisco, California; Atlanta, Georgia; Chicago, Illinois (the Chicago O'Hare facility); and Schiller Park, Illinois (the Schiller Park facility), and together with the Chicago O'Hare facilities collectively called Respondent's Illinois facilities, has been engaged in the provision of air cargo services to airlines.

During the past calendar year, Respondent, in the course and conduct of its business operations, performed services from its Illinois facilities valued in excess of \$50,000 for corporations located in States other than the State of Illinois.

During the past calendar year, Respondent, in the course and conduct of its business operations purchased and received at its Illinois facilities goods, products, and materials valued in excess of \$50,000 directly from points outside the State of Illinois.

Respondent is now, and has been at all times material here, an employer engaged in commerce within the meaning of Section of 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is now, and has been at all times material here, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is a corporation engaged in the business of cargo handling services for various air carriers nationwide. Gateway commenced its operations in approximately 1980, and handled the cargo for many airlines in various cities on a contract basis. Prior to June 1, Respondent operated from two facilities in the vicinity of Chicago's O'Hare airport. They included an import operation in the Delta cargo building at O'Hare, and an export facility in the Alitalia building.

²Counsel for the General Counsel's motion to strike Respondent's reply brief is granted.

At that point and time, Respondent employed 35 rank-and-file employees.

Ogden Maintenance Cargo Services, Inc. (Ogden) was a competitor of Respondent in the air cargo business. It also provided cargo handling services for various airlines at O'Hare including El Al, LOT, AerLingus, and KLM Airlines, Ogden's largest customer accounting for approximately 90 percent of Ogden's business in May 1990.

In April 1990, Respondent sought to expand its operations as a result of successfully competing for, and being awarded, the contract from KLM Airlines to service KLM's operation out of Chicago's O'Hare Airport.

The Union had represented a unit of Ogden employees consisting of all dock agents and office agents since 1984. Approximately 50 to 60 employees were employed by Ogden during the month of May 1990. They were covered by a collective-bargaining agreement which was in effect from June 1, 1989, through May 31, 1992.

In order to implement the new contract between Respondent and KLM, on or about June 1, Respondent sent a management individual, Lloyd Barber, to oversee its operations there. It was Barber's function to oversee the construction of Respondent's new facility located at O'Hare, and to begin interviewing and hiring employees to perform the additional work the KLM contract would generate. He arrived at Respondent's Chicago operation in mid-April. Barber had full authority to make decisions with respect to hiring and he anticipated hiring 40 to 50 additional people for the work which would be created by KLM's air freight. The additional staff, according to Barber, was to be selected by hiring the best qualified applicants and realigning assignments of existing Gateway employees. Barber's wife, Ina Barber, was employed by Respondent as an administrative assistant to Barber, and she assisted him in the hiring process.

Testimony reflects that Respondent's method of operation was to attempt to achieve greater economy by maintaining work forces smaller than those traditionally used by air freight handlers. Barber testified that he intended to use 40 to 50 employees to service the KLM contract, as opposed to Ogden who utilized over 70 employees to perform the same functions. Chuck Fiske, who had worked for Ogden as an assistant manager and subsequently became a supervisor for Respondent, testified that Respondent was able to operate with a much smaller work force because it uses highly qualified employees to perform many different tasks. Moreover, cross-utilization of qualified personnel is highly stressed by Respondent and allows it to economize its operations.

As a means of obtaining applicants, Respondent placed ads in various newspapers such as the *Chicago-Sun Times* and a local airport journal. Also, Barber sought assistance from the State of Illinois economic development department. Ogden employees were invited to apply for employment with Respondent, through Ogden's administrative assistant, Jeanne Andres (Porter), told Ogden employees to apply for jobs. The screening process began approximately on April 20.

Barber was given an office so as to be able to interview applicants, including Ogden employees and individuals from the general labor market, who responded to advertisements in the newspaper. Applicants were asked to complete an application and to be interviewed by Barber. Also, applicants were given a personnel selection inventory test (PSI). There

was also a background and a driver's license test, and a physical examination, including a drug screen.

Barber interviewed approximately 200 applicants in April and May 1990. He considered his personal observations of the individuals working at Ogden and recommendations concerning them. These recommendations usually came from the supervisors of the Ogden employees.

Jerome Adducie was the KLM cargo handling supervisor in Chicago. As such, he oversaw the performance of the Ogden employees in handling KLM's air cargo freight and formed opinions regarding these employees. They were communicated to Barber in a memorandum which Adducie made available to Gateway management in Los Angeles, California. In his memorandum, Adducie set out two levels of Ogden employees, the first being 23 persons whom KLM referred to as "core group." Adducie referred to a second small group of 8 individuals from the list of 33 core employees who he characterized as "absolute mainstays." The absolute mainstays were people who Adducie felt were highly qualified and necessary for the Gateway operation.

Barber only considered recommendations once an applicant had completed successfully the entire process, and no applicant was hired without a successful interview by Barber, a passing score on the PSI test, the 5-year background check, a valid driver's license, and the medical exam which must reflect negative on the drug screening. The only individual who was hired and had not successfully completed the PSI test was Giovanni Carlino. It was obvious when Carlino took the stand at the hearing that his command of the English language was nonexistent. I was unable to administer the oath to him and accordingly excused him from testifying. Carlino was unable to successfully complete the PSI test but he was hired based on the outstanding recommendations of his supervisors, coworkers, and Barber's evaluation of Carlino's work, which Barber observed during his tours of the warehouse in April and May 1990. The exception in hiring Carlino was because the test was unavailable in Italian and he spoke virtually no English. Because of Carlino's outstanding work record and evaluations, Curtin³ contacted London House regarding Carlino's test results. London House is the company that assembles the test and scores it. It advised Curtin that Carlino's failure reflected solely that he did not understand the test and therefore it was invalid. According to documentary evidence and testimony, no other applicant's test was rendered invalid by a low accuracy score. Carlino's test reflected that his accuracy score was below the standard.

During the interviewing, Barber kept a log which he utilized to keep track of the applicants and at what stage they were, during the application procedure. The log was also utilized by Barber to track equal employment criteria to make sure that the Respondent was staying within the law, with respect to age and race. Barber utilized another log, in which to record the results of his interview with an applicant and his impressions of said applicant. He completed this log during the interviews of the applicants.

As of June 1, Gateway's Chicago operation occupied four buildings. The air cargo business for KLM was performed at the same two buildings which Ogden had used. These buildings were owned by the city of Chicago and leased to KLM. One housed KLM's export cargo and the other its import

³ Respondent's human resources director.

cargo. Of Gateway's four buildings, three were basically across the street from one another, and the fourth building housing KLM's import cargo was several miles away. Each of the four buildings had its own timeclock, lunchroom, and locker room.

On approximately January 17, 1991, Gateway completed construction of the building which had been under construction since Gateway was awarded the KLM contract. When this building was completed all of Gateway's operations were consolidated into this one location. The 40 to 50 complement of employees which Barber had thought would be necessary to service the KLM contract was reduced to approximately 35 people.

A unit of all dock agents and office workers employed by Ogden were represented by the Union prior to the advent of Gateway.

The Union alleges it made a demand for recognition on Gateway in a letter mailed on June 1, 1990, addressed to Gateway at the building out of which it operated on Rose Street in Schiller Park. Accordingly, the Union avers that Respondent's failure to bargain with it following the June 1, 1990 letter, constituted an unlawful refusal to bargain within the meaning of Section 8(a)(5) of the Act. Respondent contends the letter was never received by it. It is undisputed that the letter was not mailed certified or registered.

Jeanne Porter (Andreas) testified that she was the administrative assistant for Ogden prior to June 1. As such, she was the only individual responsible for opening mail for Gateway's Rose Street facility. She testified that she never received an envelope from the Union and prior to the hearing had not seen the demand letter. Porter was unequivocal that she would have recalled receiving a letter from the Union demanding recognition, because she would have not known to whom the letter should have been routed and would need to seek assistance.

Joseph Condo, who was president of the Union, and Robert F. Davis, who was general secretary treasurer of the Union, testified that they prepared and mailed a letter to Respondent at its Schiller Park address, in which the Union requested recognition in the same identical unit that was previously represented by the Union at Ogden.

The letter was directed to Barber who was in charge of Respondent's Chicago operation. He testified that he never saw nor received the demand letter.

The record reflects that beginning on June 1, Respondent provided essentially the same services for KLM that Ogden had performed prior to that. The same facilities, Schiller Park Import Facility and KLM Export Facility located at O'Hare and used by Gateway, were the ones used by Ogden. Employees hired by Respondent for the KLM contract used similar equipment and skills working under similar conditions as Ogden employees. As in the case of Ogden, Respondent leased its equipment, although from a different lessor. Job classifications were similar and Respondent's employees were supervised by individuals who had previously supervised the Ogden employees who performed KLM work.

Chuck Fiske, a witness called by counsel for the General Counsel, worked as an assistant manager for Ogden. He testified that after May 31, he went to work as a supervisor for Respondent. Fiske testified, in explaining the reason why Gateway was able to staff the KLM work with a lot less employees than Ogden, that Respondent consolidated operations

and stresses cross-utilization of personnel. People are used not only in performing KLM work but also to perform work on other contracts of Respondent. Barber testified similarly that Respondent's employees were trained in a greater variety of tasks and had to be familiar with crate loading requirements of a number of Respondent's customers, and that employees were switched back and forth from contract to contract.

Many of the employees who were supervisors at Ogden were employed by Respondent as rank-and-file. As stated earlier, Gateway and Ogden's equipment was leased through different companies. Gateway's equipment is marked with its name, it did not lease equipment from Ogden. Gateway purchased vans, office equipment, and a truck.

Counsel for the General Counsel and counsel for the Respondent entered into a stipulation regarding the unit to be litigated:

All full-time and regular part-time dock agents and office agents employed by Respondent in Respondent's Chicago, Illinois area facilities, but excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

In order to maximize the productivity of the employees, Respondent interchanged its employees between the various contracts for the airline carriers. Although Ogden operated differently than Respondent, in that it did not utilize this interchange, Ogden was organized by the Union on a Chicago-wide basis. Thus the single Ogden unit included employees that worked on different contracts and different buildings sometimes miles apart, and utilized different lunchrooms and locker room facilities.

The General Counsel and the union counsel, subsequent to the stipulation, are now seeking a unit of only those employees who service the KLM contract. The terms and conditions of the employment of Respondent's employees in Chicago, whether assigned mainly to the KLM contract or to other contracts are set forth in an employee handbook. Barber testified that the wage structure of all employees was very similar regardless of the contract assignment. The hours of work were the same and the shifts each contract required were very similar. Moreover, all Gateway employees in Chicago received the same medical benefits, dental benefits, sick time, vacation time, holiday pay, and retirement programs. All employees, regardless of their main contract assignment reported to Barber.

Testimony by Barber and others reflect that Gateway employees had the same job classifications, i.e., cargo agents, office agents, and lead agents, regardless of the contract to which they were assigned. Their skills are the same regardless of contract employment. Furthermore, the amount of time spent away from the facility by employees would be the same, regardless of a contract assignment. With respect to interchange, it occurred two or three times a week in order to meet the demands of flight schedules. Six of the 35 previous Gateway employees were used to staff the KLM operations. The Gateway organizational structure included all contract operations reporting to Barber. He controlled labor relations regardless of the principal contract for the employee.

The parties stipulated "that beginning on June 1, 1990 and continuing until January 18, 1991, Gateway conducted its operations in the Chicago, Illinois facilities which included those facilities previously used by Ogden in the performances of services for KLM."

Record testimony reflects that in order for Respondent to be able to perform at a substantially normal level of operation for KLM on June 1, 1990, Gateway necessarily used employees from other locations who came to Chicago temporarily to assist in the startup of the KLM contract assignment.

Whether the critical date be considered June 1 or 30, 1990, testimony and documentary evidence reflect that at no time did Ogden employees comprise a majority of the overall compliment of Respondent's employees. The question is, did Respondent engage in an unlawful scheme to avoid successorship status, and an obligation to recognize and bargain with the Union by discriminatorily refusing to hire former Ogden employees because of the union affiliation?

As of June 1, 1990, there were at Gateway a total of 68 rank-and-file employees. Thirty-five were Gateway employees prior to May 31, and 22 were former Ogden employees. Eleven employees were hired from the outside labor market.

As of June 30, 1990, Respondent employed a total of 79 rank-and-file employees, 35 were Gateway employees prior to May 31, 1990. Twenty employees were former Ogden employees and 24 were hired from outside labor market sources.

The amended complaint contains no independent allegations of Section 8(a)(1) of the Act with respect to unlawful interrogation or threats. Counsel for the General Counsel takes the position that certain statements made by supervisors demonstrate Respondent's antiunion animus, its opposition to unions, and its desire to avoid having a union as a collective-bargaining representative for its employees. Moreover, according to counsel for the General Counsel, the statements would be violations of Section 8(a)(1) of the Act if they were not barred by Section 10(b) of the Act.

Russell Scheitlin, an employee who is no longer employed by Respondent, testified that during his job interview with Barber, the last week in May, Barber told him that there is not going to be any union at Gateway, that Gateway does not believe in unions, does not deal with unions, and that there would not be any union in Respondent's operation.

Scheitlin admitted that he raised the issue of unionization with Barber during his interview. Moreover, during his interview, Scheitlin repeated to Barber the statement of Union President Condo, that if the Union represented a majority of Respondent's employees the Union would continue as bargaining representative. In response to Scheitlin's question regarding whether the Union would continue to be the employees' bargaining representative, Barber stated that Gateway was then nonunion and that the employees and management would have to get to know one another. Barber testified that in reaching any hiring decision, he did not consider whether or not someone had any union affiliation. Moreover, he specifically denied that during the application process, he raised the subject of unionization in any way with the applicants. Barber further testified that the subject of unionization came up probably six to eight times. According to Barber, there were people who were concerned about working in a non-union environment. Furthermore, there were people con-

cerned about working in a union environment. Barber told the individuals that Respondent was a nonunion company and preferred dealing with the employees rather than a third party, but everybody has a right to representation if they so wish. Specifically he testified with respect to his discussion with Scheitlin that Scheitlin brought up the subject about the Union and he, Scheitlin, did not want to be in any union environment. Barber told him Respondent was a nonunion company but that he had no control over it, if the Union came in and took a vote, he had no control over it.

Elywerto Gemina testified that Barber told him Gateway would not be unionized and that Gateway did not believe that it needed a union to operate. According to Gemina, Barber stated further that he attributed the lack of union organization at Gateway to the fact that KLM does not want a union.

Barber denied the conversation with Gemina with reference to unionization and testified further that "I could not speak on behalf of KLM."

Preston Earl Crisler Jr. testified that he was interviewed by Barber sometime in May, possibly mid-May 1990. During his discussion with Barber, Preston testified, "I was mostly concerned with the hospitalization plan and the wages, so, I asked him about the wages." According to Crisler, Barber stated nobody's salary would change from what they were making at Ogden. Crisler asked about the KLM operation and Barber asked Crisler if he would be willing to take a lead position or show some of the other employees the operation for KLM. Crisler responded that that would not be a problem. There was further discussion about the hospitalization plan and Barber allegedly told Crisler it was similar to one that Ogden employees had with the Union, but that Respondent was nonunion. Moreover, according to the testimony of Crisler, Barber told him how many years he had been working for Respondent and that Respondent had never been in a union and never would be.

Barber specifically testified recalling telling Crisler that Respondent never had a union and was presently a nonunion company.

Roosevelt Smith testified that during his interview, Barber told him that Respondent is a nonunion company and would remain a nonunion company.

Steve Hammond testified that he was interviewed by Barber in May 1990. Hammond testified as follows, "Ok, he [Barber] told me what he had to offer me and what I had asked about was pension, benefits. He told me about Gateway's benefits and how long he has been working for Gateway. Just the typical things that he would talk about, money, advancement potential, just things that he would generally talk about." When asked on direct examination whether there was anything else discussed during the interview, Hammond responded, "Yes, we talked about how long they had been in business. He asked me about my attendance, typing skills and if I was familiar with a computer, things of that nature." Hammond asked Barber why there was no union, and according to Hammond, Barber did not respond. Hammond testified that Barber did state that Respondent does not have a union and that they have not had one, but that does not mean that they would not ever get a union in the future.

Hammond testified further that Barber made a comment, "He didn't know but they kind of tried to keep away from it." According to Hammond, Barber stated that there was

nothing to be afraid of as long as you show up on time and do your job duties. They really like punctuality and you doing your job and if you did that, then you do not have anything to worry about.

Andrew Knox testified that in his job interview with Barber, Barber discussed the Gateway operation and how “they” want you to have your uniforms and there would not be a union. According to Knox, Barber, during the discussion of the Gateway operations, stated that there would not be a union because Barber’s supervisors would take care of all of that, there would be no need for one. Furthermore Barber allegedly stated that, “They weren’t taking any crap off of anyone.” Knox continued that Barber stated his supervisors were strict and were not taking any crap and that was basically the reason they do not need a union in their operations.

Barber testified that he could not have told Knox that there would not be a union, that he has no control over it. He responded further that Respondent was a nonunion company.

Nicola Chiusolo testified that he was interviewed by Barber. According to Chiusolo, Barber talked about the Company, benefits, and rate of pay. In response to a leading question, Chiusolo testified that Barber allegedly stated Respondent was nonunion and it intended to stay that way. On cross-examination Chiusolo stated that his affidavit contained the statement, “He [Barber] mentioned to me that Gateway was a non-union company and they want to stay that way.” Chiusolo testified that in fact that was what Barber stated to him during the interview.

Barber testified that he recalled the only conversation he had with respect to the Union was that Gateway was a non-union company.

Counsel for the General Counsel cites as additional proof of Respondent’s animus, Barber’s interrogation of Ogden Supervisor James McDonough, about his attendance at a union meeting held at Rog’s Restaurant on May 18.

As a supervisor, McDonough was not a member of the Union when he was employed by Ogden. After May 31, McDonough was hired by Respondent as a supervisor. After approximately 6 months, McDonough was terminated by Respondent, allegedly for misappropriating funds.

McDonough testified that while he was still a supervisor in the Ogden organization he joined a unit employee for a beer at “Mama Kay’s.” From there the unit employee, Andy LaRocco, stated he had to go to a union meeting at a restaurant called “Rog’s.” Rog’s facility has a restaurant lounge and, according to McDonough’s testimony he waited in the lounge drinking beer while LaRocco attended the union meeting in the restaurant with other employees. According to the testimony of McDonough, the next day, Barber asked him if he had been at the union meeting, to which he responded he was in the building where the meeting occurred, but he did not actually attend the meeting. McDonough alleges that Barber told him he would have to speak to Gateway’s attorneys because he had been present in a place where a union meeting occurred.

Although McDonough’s testimony is not quite clear, it appears that he is implying that Barber asked him to talk to Respondent’s attorneys because if he was a union adherent he would not be hired.⁴

⁴ At this time, McDonough was an admitted supervisor and not a member of any union.

Barber testified that McDonough approached him and asked if saw the bulletin referring to the union meeting at the restaurant. McDonough stated that he was going to the meeting and he was going to let Barber know who was in attendance. Barber responded that he was being put in a compromising position and he did not want McDonough to attend the meeting, but inasmuch as McDonough was not a Gateway employee he could not stop him, but that he should please not attend.

The next morning, according to Barber, McDonough came to him and stated, “I went to the meeting but I didn’t go in. I sat at the bar and sucked down a few.” Allegedly, McDonough went on to state he would let Barber know who attended, and Barber said he did not want to hear about it and does not want to be in that situation. Barber testified that he dropped the conversation at that point. Respondent hired McDonough in a supervisory capacity.

Testimony was adduced with respect to McDonough’s termination. Barber testified that there were two reasons for his termination. One was that he had a habit of showing up late for work as much as up to 3-1/2 hours, and that he had been counseled by Barber both verbally and in writing. The final basis for McDonough’s termination, according to Barber, was that he improperly handled \$601.44 which had been entrusted to him as Respondent’s supervisor.

On a Sunday McDonough accepted \$601.44 in cash and logged the money into the safe. When he left work at the end of the shift, he took the money out of the safe with him. When Barber checked the safe on the following Tuesday morning the money was missing. According to Barber, he attempted to reach McDonough by telephone regarding the missing funds on Wednesday, Thursday, and Friday with no results. Barber then got in touch with the police department, and, rather than Respondent pressing charges, the police contacted McDonough by telephone and told him that Barber had contacted them about pressing charges against him. After the telephone call McDonough returned the missing money to Respondent. At that point Barber terminated his employment. Barber was suspicious because the 6, \$100 bills that McDonough returned, which had been in his pocket for almost a week, were brand new crisp \$100 bills.

Chuck Fiske was an assistant manager at Ogden, who was hired by Respondent and assigned primarily to the KLM contract. Fiske alleges that during his interview with Barber they both agreed that they did not want to see the Union come to Gateway. According to Fiske, he said that he did not want the Union at Gateway because he had a lot of problems with it at Ogden. Moreover, he was not sure if it was during his interview, but in this course of discussions, both formal and informal, he remembered an occasion where Barber said he thought that Joe Finley, president of Respondent, would rather shut down, than let the Union come to Gateway.

Fiske testified that the Union came up between himself and Barber on at least 20 occasions during an 8-10-week period. Moreover, in the aggregate, his conversations took up either a couple or several hours. When asked who would be the first to bring up the question of the Union, Fiske did not recall, he stated either he or Barber could have brought it up first.

Fiske also testified that in spite of his opposition to the Union he made a strong recommendation that Rich Waters,

the union steward at Ogden, be hired, because he was an outstanding employee.

I note that Fiske's affidavit, given to the Board agent, contains no statement regarding Finley's alleged comment to Barber and Barber's communicating the information to Fiske. Fiske also testified that he spoke with Ogden and Curtin, Gateway's human resources director, wherein Fiske provided Curtin and Barber with a contract between Ogden and the Union. According to Fiske's testimony, Curtin allegedly suggested that Gateway distribute a letter expressing Gateway's opposition to unionization. There is no evidence in the record that such a letter was ever disseminated.

Approximately 5 months after Fiske was hired by Respondent as a supervisor, he was demoted to the position of office agent rather than lead agent which was a demotion of two notches. He acknowledged that management specifically, Dean Vaccarino, who at that time was Respondent's terminal manager, was not satisfied with Fiske's supervisory abilities.

Fiske's demotion occurred after his probationary period was extended by a month. After his demotion Fiske acknowledged that his employment record was laden with reprimands, counseling, suspension, and probation. Ultimately Fiske quit his employment with Respondent.

Dennis Paschen was employed by Respondent as an assistant terminal manager from October through December 1990, when he was promoted to terminal manager. As such, he reported directly to Vaccarino. Respondent fired Paschen in April 1991.

Paschen testified that at supervisors meetings in April and May 1990, Vaccarino stated that the PSI test was being utilized by Respondent during the hiring process for the KLM contract to "weed out" union employees. Paschen's testimony is the only testimony of any supervisor that such an alleged statement was made.

Vaccarino and Barber denied making statements to supervisors or anyone else regarding the use of a PSI test to "weed out" Ogden employees.

Paschen also testified that Respondent wanted to limit the number of Ogden employees it hired in order to avoid the Union and that Curtin stated that Gateway wanted to hire 25 or 26 employees from Ogden's work force. Paschen testified further that in general conversations with Barber, Barber stated if the Chicago facility became unionized Joe Finley would close the operations. This statement is also attributed to Barber. Both Barber and Vaccarino testified that they did not believe Finley would be spending \$15 million on a building only to close down the business. Vaccarino's response was allegedly to a question at a supervisor's meeting by Paschen, that he had heard Finley, the owner of Gateway, would close it down if it were to go union.

A profusion of testimony was elicited, much of it hearsay, to discredit Paschen. The hearsay was not admitted to litigate the truth or falsity or the merits of Paschen's termination. Rather, the Respondent was given the opportunity to register its good faith, or lack of same, as the motive for firing Paschen, and to test his credibility.

On March 30, 1991, Paschen was formally disciplined and given a written warning concerning allegations regarding his harassment of a female employee who resigned from Respondent's employ possibly because of this situation.

In April 1991, while Paschen was on vacation, several of Respondent's employees, who were supervised by Paschen,

approached Vaccarino regarding complaints about Paschen's treatment of employees based on race and sex. Vaccarino conducted an extensive investigation into these allegations and as a result he believed the charges were true. Vaccarino took written statements of several employees and on April 8, 1991, Paschen was put on a leave of absence pending completion of the investigation. When the investigation was completed, Respondent believed that the complaints were truthful and that Paschen was racially biased and sexually discriminatory. Accordingly, Paschen was fired.

Paschen hired an attorney for the purpose of getting unemployment compensation benefits. He was found to be not entitled to unemployment compensation benefits for his termination.

A. The Hiring Process

Respondent used the same criteria systemwide for hiring at its facilities. A potential employee was given a 5-year background check, must have a valid driver's license, and was given a personal interview. Moreover, an individual was given a drug test as required by U.S. Customs. It was also necessary that an individual receive a passing grade on the PSI test. The PSI test was implemented shortly before the staffing of the KLM contract. The PSI test at this time was implemented systemwide.

An individual was also given an physical examination which included the drug test required by U.S. Custom Service.

Respondent's director of human resources, Dan Curtin, testified that he made the decision to utilize the PSI test as a screening tool. Curtin had used objective tests in the past when he was director of human resources for other employers, including Borg Warner, a union employer. The PSI test asks questions about applicants' safety habits, honesty, drug use, and awareness. Four measurements are evaluated into a composite employee ability index. The scales used to calculate employee ability are honesty, drug avoidance, supervisory attitudes, and work attitudes. Safety is measured separately and carries its own score. A passing score on the PSI overall employee ability index is 40. A passing score on the safety index is 35 or higher. After the test is taken, the scores are then coded and sent to Respondent's headquarters for grading. The score sheet is scored by a computer as acceptable or unacceptable, according to the software supplied by Londonhouse, the manufacturer of the test. Respondent cannot change the software used to grade the test and played no role in creating the grading software. Londonhouse sets recommended passing grade which was adopted by Respondent.

Curtin testified as follows with respect to why he chose the PSI test over other tests, "The PSI itself had a separate rating for safety purposes and also for drug avoidance which are the two areas of importance to us since we are part of the airport community and are subject to FAA regulations and DOT regulation regarding drug testing. It is an expensive process to give somebody a physical and when you fail it you are out of that money because you can't hire them. I wanted a way to maybe help reduce the incidence of positive drug tests when people are hired in. I also wanted to find a way to uncover attitudes that would be conducive towards theft, which is a significant problem in our industry as well as workman's comp, incidents of safety violations and acci-

dents, which were all things I felt that the Londonhouse test measures better than the Reed test.”

Documentary evidence reflects that the Ogden employees successfully completed the PSI test at a much greater rate than did employees from the general labor market. All persons hired by Respondent passed the PSI test and were subjected to the same physical examination. The only individual, a former Ogden employee, Carlino, was hired, although he failed to successfully complete his PSI test. Carlino received outstanding recommendations from his supervisors and co-workers including Barber’s evaluation from personal observation. Barber testified he found by watching Carlino that he was very proficient in what he did, and could communicate in sign language. Carlino’s test results indicated that he did not fail any of the substantive scores but his accuracy score was below standard. In this regard, Curtin contacted Londonhouse regarding Carlino’s test results. Curtin was advised by Londonhouse that Carlino’s failure on the validity score simply indicated that he did not understand the test because of the language barrier.

Roosevelt Smith, Sonny Pittman, and Phillip Mazzio each took the PSI test more than once over a 12-month period. Vaccarino testified that he thought that Curtin told him that an employee who had taken the test previously must wait 6 months to take the test again. Respondent, through Vaccarino, felt that they needed to hire Pittman who had been a good Ogden employee. Pittman failed the PSI test he took in May 1990. In July 1990 Respondent contacted Pittman and he took the PSI test a second time. Terminal manager at that time for Respondent, Vaccarino, did not know that Pittman had taken the test within the past 6 months and therefore retested in error.

Roosevelt Smith, another former Ogden employee, took the PSI test the second time over a year after he initially sought employment with Respondent. Smith passed and was hired after taking the test a second time.

Mazzio applied for an office position and scored a 39 on the test which is one point below passing. He had erroneously been given the PSI warehouse test rather than the office test. As a result, Respondent asked Mazzio to take the test again on the proper test form.

Counsel for the General Counsel takes the position that Respondent failed to maintain a controlled environment when administering the PSI test to job applicants. Barber’s wife Ina, and Porter distributed the test to the applicants. The applicants completed the test in the work area at Ogden after receiving them from the desk of Supervisor Fiske. The completed books were then returned to Fiske’s desk. Based on this, counsel for the General Counsel avers that Respondent should have realized that the test results may have been tainted. There is no evidence that an applicant’s test results would be adversely affected by administering the test in an environment that was not controlled.

Barber’s uncontradicted testimony is that Robert Bruce, Eugene Eason, Brent Wills, and Maurice Phillips never applied for employment with Respondent. Moreover, the uncontradicted testimony is that Derrick Wells (Wills) was an individual who had an appointment for an interview with Barber and never appeared for the interview.

Several individuals initially looked towards employment with Respondent, but during the course of the application

process withdrew their applications, expressing that they were no longer interested in employment with Respondent.

Kim Haiges withdrew from the application process prior to being offered a job. She left the employ of Ogden before Respondent had fully implemented its application procedure. A friend of Haiges’ and a former Ogden employee, Mary Kolodziej testified that she was aware that Haiges accepted a position elsewhere prior to working for Respondent.

Barber noted on his log, Haige’s withdrawal from the application process Candice Kubow, who is a current employee of Respondent, having been hired on February 3, 1991, testified that she told Barber in May that she did not want to work for Respondent, that she was going to do something else. Accordingly, he took herself out of the application process during the time she was working for Ogden.

Preston Crisler completed the employment application and was interviewed by Barber. Crisler acknowledged in his testimony that Barber asked him if he would accept a lead position with Respondent. Barber testified that he had made a decision to hire Crisler pending the outcome of his physical and his PSI test results. Crisler completed the PSI test and a day or so later Barber misplaced his test booklet. Accordingly, he asked Crisler to complete a second test. Crisler never attempted to obtain a second PSI booklet from Barber. Barber testified that on May 29, his wife received a telephone message from Crisler that he had accepted other employment. This was noted on Barber’s log. Porter, the former secretary of Ogden’s terminal manager, and Respondent’s terminal manager testified she knew Crisler as a coworker and friend. According to her, Crisler told her he was not going to go to work for Respondent, but was going to file for unemployment for a while while waiting for a specific job to open up. Crisler denies this conversation with Porter. He does acknowledge that he received unemployment compensation for 6 months, from June to November 1990, and then accepted a job with AAC Express, exactly 6 months after his Ogden employment ended.

Sherry Grela failed to complete the application process for employment with Respondent. Barber testified that he would have hired her but she told him she had accepted other employment. This fact was recorded on the interview sheet. Respondent introduced documentary evidence reflecting that Grela became a full-time employee with Link America.

Documentary evidence reflects that William Saunders did not show up for his interview. There is no evidence to refute this.

Deborah Taylor was employed by Respondent pending completion of her physical exam and the drug testing. Barber had been impressed by Taylor who was very experienced. He had scheduled her to leave for Amsterdam, where KLM conducted the dangerous goods training required of employees who service its contract. Taylor did not appear for her physical and drug test until several days after a scheduled appointment. The laboratory contacted Barber who advised them that it was too late for Taylor to complete her physical and drug test, because she already missed the training for which she had been scheduled in Amsterdam. Barber explained this situation to Taylor and told her further he presumed she was going to accept employment with the Respondent. This episode was noted on the log and interview sheet.

Richard Waters applied for employment and on completion of a PSI test placed it on the desk of Ogden Supervisor Chuck Fiske. Waters testified that there were other completed test booklets on Fiske's desk and they remained there for several days. Waters made no inquiry of Fiske or Barber as to why his PSI booklet continued to remain on Fiske's desk with other booklets. After a week, Waters took his book off of Fiske's desk and took it home with him. He acknowledged that he neither told Barber or Fiske of his action although he saw Fiske on a daily basis. Waters testified that he assumed since the booklet wasn't turned in, that he was not going to be hired and he left it at that. Waters acknowledged further in his testimony that he had no reason to believe that Fiske would not turn in his booklet to Barber.

Respondent sets forth as another reason for not hiring Waters his negative recommendations by Vaccarino and Marcel Brunious. Moreover, Waters' prior employment with Continental Airlines was terminated. Vaccarino recommended against hiring Waters based on his experience working with him at Continental. Waters worked the shift immediately preceding Vaccarino's. Both Vaccarino and Waters were charged with performing crate transfers. Vaccarino testified that Waters' did not complete his work during the shift, making it more difficult for Vaccarino to keep up with his work. According to Vaccarino, Waters' failure to complete his work was due in part to his gambling activities. He ran a check pool where it was necessary for him to contact every Continental employee and solicit their participation in the pool.

Ogden Supervisor Brunious advised Barber that he would not have hired Waters because he could not depend on him, Waters was lazy and slow. A necessary part of Waters' job was building pallets and, according to Brunious, he was not interested in building pallets and he was also not proficient in performing this work.

Tom Foy, a supervisor for Respondent also was employed by Continental during the same time as Waters. According to Foy, Waters was not a hard worker and lacked personal incentive.

Jim McDonough and Chuck Fiske testified that they had recommended Waters for employment.

With respect to his termination from Continental, Waters told Barber that as a member of the "skid committee" he took it upon himself to take the proceeds from skid sales, and after failing to seek permission from anyone, he used the money to entertain employees on his shift. Therefore Continental terminated him for selling skids without company permission, and retaining the proceeds.

Because they failed the PSI test, Respondent did not employ the following individuals: Tremont Burns, Alexander Butler, Nick Chiosolo, Evan Fermont (Fermaint), Brian Flowers, Gerard (Jay) Fowler, Gilberto (Gil) Guzman, Salvatore (Sal) Guzman, Andrew Knox, Darlene Lanham, Andy Larocco, Sonny Pittman, Frederick (Rick) Priest, and Roosevelt Smith.

Respondent assigned ancillary reasons for not hiring some of the above-named individuals. For example, McDonough, a witness for the General Counsel testified that more than once, "He [Knox] would come in smelling like a brewery." Pittman was given an opportunity to take the PSI test on September 7, which he also failed. Roosevelt Smith was given a second opportunity to take the PSI test after 6

months. Smith passed the test and was hired. He was later terminated for his attendance record during his first 3 months of employment.

William Saunders had scheduled an appointment for an interview on April 25, but Barber testified he did not show up for this appointment. Barber's log reflects this, and he testified that he never heard from Saunders afterwards.

Billy Allen and Glenn Miller were both fired by Ogden for unsatisfactory job performance prior to June 1, 1990. Allen had only 3 months experience at Ogden. Prior to that, he worked as a security guard, which involved no warehouse or airline experience, and prior to the security guard job, he was a cook. Miller, who was also fired by Ogden for poor job performance was also referred to on Barber's log as "Not a ball of fire." In other words, according to Barber, Miller was lazy. Moreover, Barber testified that Miller was going back to school in September. Miller's background was that he began with Ogden in February 1990, worked for Continental Air Express as a ticket agent and he was a taxi driver.

Theodore Carter was not hired by Respondent when his background check reflected that he had been arrested on four occasions, two of which were drug related. Because of the United States Customs' regulation, that an employee be bondable, Carter was unemployable by Respondent.

Eli Gemina had attendance problems when he was employed by Ogden. When Gemina was asked on cross-examination if he was sick 1 day a week, at least, he responded that he did not recall if it was consecutive. Gemina conceded that he received two or three warnings by Ogden for his absenteeism. He testified that he did not consider that he had been warned by Ogden, rather they were merely a "barometer." Gemina testified further that he had received an award for honesty when he worked for Ogden because he turned over found jewelry to his supervisor. Moreover, he won a contest as a result of his knowledge of the KLM procedures and practices. Gemina acknowledged that he never communicated winning these awards to Barber.

Barber testified that he did not hire Reginald Johnson because Johnson advised Barber that there were conflicts between his school schedule and Respondent's needs. Barber recorded this on the interview sheet. Furthermore, several supervisors of Ogden recommended against hiring Johnson and testified that he was lazy, displayed a poor attitude, and kept his own pace. Amato stated that he had experienced problems with Johnson's attendance.

Barber's testimony and log entries, reflect that Umberto Pagan was, during his interview, showing little interest. Moreover Pagan indicated that he was burned out and not interested in continuing in the air freight business. Another entry in the section relating to Pagan reflects that he might move to Florida and he took a long time turning in his PSI and application. Pagan denied making this statement, and he further denied he made similar statements to Oates, Kolodziej, and Porter. Pagan also testified that none of the Ogden employees wanted to work for Respondent.

According to the testimony of Porter, Pagan felt he had left employment with Continental and taken a pay cut to work with Ogden. Pagan was of the opinion that he would have to take another pay cut, and stated to her that he did not want to go through it again. Pagan denied that he told Barber he wanted to move to Florida, but at the same time he admitted that he had been saying he wanted to move to

Florida for many years and that he traveled to Florida as late as 1990. He claimed this was his yearly trip to Florida and denied that he was looking for work there. Pagan was an evasive witness, who I discredit.

Barber did not hire Greg Walker because he only had a few months experience, and was given a poor evaluation by his supervisor. Brunious, a supervisor at Ogden, testified that Walker was a mediocre employee, who had to be told what to do repeatedly, and prodded to complete assigned tasks. Fiske did not recommend Walker for employment.

John Ingram had only been employed by Ogden for approximately 6 weeks, and Barber was told by his supervisor that he was not a hard worker and had an attendance problem. This was noted in Barber's log. Another Supervisor Mugni, testified that Ingram had to be watched to make sure he was performing his job properly.

Tyrone Garr was also poorly recommended by his supervisors, and he was not available to work in the morning. Barber's log also reflects that he was advised that Garr was not dependable.

Anthony Hawkins had only 6 days of experience with Ogden at the time Gateway assumed the KLM contract.

Brunious testified that Hawkins was lazy and lacked initiative. Accordingly, Barber did not hire Hawkins.

Although Fiske testified that he recommended Tyrece Hooker, for employment, Hooker was not hired. He had been employed by Ogden since November 1989, and his supervisors gave him poor recommendations, as is recorded in Barber's log. Both Mugni and Amato, who supervised Hooker at Ogden, testified that he was unenthusiastic about his work. Mugni testified that Hooker attempted to avoid work by hiding from Mugni.

During his interview with Barber, Ken Lucas was asked by Barber what his goals were in working for Respondent. Lucas' goals were to have good pay, a good job, not too strenuous working conditions, and to drive a forklift all day. Barber did not hire Lucas because he felt that anyone who lacked ambition to that extent would not be a good employee.

Bevon Stovall had only been employed with Ogden for approximately 6 weeks. He was 20 years old at the time of his application, and Barber was of the view that his work experience was limited only to that which he acquired as an Ogden employee. Stovall did not include any previous experience on his application form. As a result of these facts, Stovall was not selected for employment with Respondent, based upon his lack of experience in the air cargo industry.

Freeman Willis was also denied employment with Respondent based on his limited experience. He only had 1-week experience with Ogden when he completed an application for employment and was interviewed by Barber.

B. Conclusion and Analysis

1. The demand

Joseph Condo, who was president of the Union and a witness for the General Counsel, conceded that he had no information from which to conclude that Respondent received a demand letter.

Porter (Andreas), a disinterested witness, testified without equivocation that she never received an envelope from the Union, and had never seen a demand prior to the hearing.

She was the only person responsible for opening Respondent's mail in June 1990. I fully credit Porter's testimony.

Interestingly, when the original charge was filed in December 1990, it did not contain an 8(a)(5) allegation. Later, after commencement of the investigation, as if an afterthought, the Union amended the charge to include an 8(a)(5) allegation.

The evidence overwhelmingly demonstrates that Respondent never received a demand letter. Accordingly, I recommend that the allegation that Respondent refused to bargain in violation of Section 8(a)(5) of the Act be dismissed.

2. Successorship

By the very nature of Respondent's business, it is similar in operation to Ogden. Respondent continued to perform services under a contract with KLM, which were previously performed by Ogden.

Respondent had stressed its cross-utilization by personnel. In my view this is not enough to alter the nature of Respondent's business sufficiently to differentiate it from Ogden.

The determinate factor as to whether Respondent is a successor to Ogden, and the threshold issue, is whether or not Respondent engaged in an unlawful scheme to avoid successorship status and an obligation to recognize and bargain with the Union.

In my opinion, Respondent conducted its staffing in a proper, legal, nondiscriminatory manner, and not with a view towards precluding Ogden's employees from being hired as a majority of Respondent's overall work force. My rationale for reaching this conclusions will follow.

This case presents a situation where Ogden and Respondent are, two distinct entities and competitors competing for the KLM contract. The contract was awarded to Respondent. Ogden is still a viable entity, operating in Chicago and throughout the United States. I conclude that Respondent is not a successor obligated to bargain with the Union.

3. The unit

Initially, counsel for the General Counsel and counsel for Respondent stipulated the unit to be litigated as:

All full-time and regular part-time dock agents and office agents employed by Respondent in Respondent's Chicago, Illinois area facilities, but excluding guards and supervisors as defined in the Act, constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

Subsequently, counsel for the Union and counsel for the General Counsel sought to reduce the unit to employees assigned to service the KLM contract. All employees of Ogden, regardless of the contract to which they were assigned, were in one Chicago-wide unit. Evidence revealed that Ogden serviced several airlines, including KLM. Ogden's employees worked in different buildings, sometimes miles apart, utilized different lunchrooms, timeclocks, and locker rooms.

When Respondent's new building was completed in January 1991, approximately 6 months after the KLM contract was awarded it, its operations were consolidated. There was one lunchroom, a single timeclock, and two locker rooms for male and female employees.

Employees from all contracts, including KLM are interchanged to accommodate flight schedules. There is the same community of interest in the larger unit as there was at Ogden.

Skills and categories of employees are the same as at Ogden, although Respondent's employees are cross-trained.

Terms and conditions of all of Respondent's employees in Chicago, are the same, or similar, regardless of what contract they are assigned to.

Wage structure is similar and hours of work are the same.

Respondent's employees receive the same medical and dental benefits, sick leave, vacation, holidays, and 401(K) programs.

Accordingly, although possibly academic, the original stipulated larger unit, is an appropriate unit. I refer specifically to those employees employed by Respondent in Respondent's Chicago, Illinois area facilities.

4. Motive and antiunion animus

Without a further recitation of the numbers, the evidence reflects that a majority of Respondent's employees were never former Ogden employees. As of June 30, only 20 of Respondents 79 rank-and-file employees were former Ogden employees. As of June 1, only 22 of Respondent's 68 rank-and-file employees were former Ogden employees.

Barber acknowledged that during his interview, he discussed the fact that Respondent was nonunion. He recalled that six to eight individuals from Ogden discussed with him whether Respondent was unionized. These people raised the topic out of their concern and wonder about working for a nonunion employer.

Barber testified that he did not raise the subject, and he specifically denied stating that Respondent would never be unionized.

I credit Barber and find him to be a scrupulous witness with an exacting memory. I discredit those individuals whose testimony is in conflict with Barber's testimony.

Scheitlin's testimony relating to antiunion animus, or to suggest an illegal motivation in staffing Respondent's work force is, in my opinion fabricated and I discredit him.

I discredit Gemina's version of his interview with Barber. Moreover, I credit Barber's denial, and note that Barber could not speak with any authority on behalf of KLM. Gemina may not have been bent on lying, I rather believe that Barber's words were erroneously interpreted by him.

During the course of Crisler's extensive testimony, he impressed me as a witness disposed to fabricate. A neutral disinterested and credible witness, Porter, testified regarding Crisler's statements regarding unemployment compensation. Crisler's denials in that regard demonstrated to me an overall lack of credibility. I credit Barber's denial of Crisler's version of the conversation.

Hammond's version coincided with Barber's rendering. There is no evidence of antiunion animus. Nor is there any evidence of a scheme to staff Respondent's work force with a minority of union members.

Roosevelt Smith, after taking the PSI test twice, was hired by Respondent. He was fired approximately 4 months later because of his poor attendance record. I believe that Smith's allegation that Barber stated Respondent would remain nonunion is pure fabrication, and I discredit Smith in this regard. Smith evinced a hostility with regard to his discharge. I cred-

it Barber's recollection of his interviews, including the Smith interview. I discredit Smith's testimony even absent any display of hostility.

Knox's testimony was ill-defined and contradictory. I believe his testimony, on direct examination to have been prevaricated, and therefore I discredit him. Conversely, I credit Barber who testified he might have said Respondent was nonunion and had not had a union in the past.

An employer may even express a desire to operate nonunion so long as he does not translate that desire into action violative of the Act. *Great Plains Beef Co.*, 241 NLRB 948 (1979).

Chiusolo, a witness who is alleged as a discriminatee, as a result of his not being hired by Respondent, testified that Respondent intended and wanted to stay nonunion. Barber denies said conversation. I discredit Chiusolo and credit Barber's denial. The three supervisors who testified with regard to antiunion animus were Fiske, Paschen, and McDonough. At the outset, the evidence is overwhelmingly convincing that they left Respondent's employ under inauspicious circumstances.

Respondent was convinced that McDonough misappropriated funds.

He worked for Respondent for approximately 1-1/2 months. I am convinced that McDonough's testimony with respect to Respondent's antiunion animus was made out of whole cloth. He was vague, ambiguous, and displayed no regard for the truth. His testimony was not credible.

By way of contract, Barber impressed me throughout, with his attention to details, his recollection and his effort to be exacting. I consider Barber a credible witness whose demeanor suggested confidence and assuredness.

Fiske's testimony regarding closing the facility,⁵ rather than allowing union organization is not contained in his affidavit. His recollection was faulty and in my opinion he contrived and perverted his testimony, in an effort to undermine Respondent's position. I discredit Fiske's testimony.

Paschen's hostility toward Respondent was palpable. He had a history of problems with Vaccarino. Respondent, as the result of its investigation, determined that Paschen harassed employees based on their race or sex. Paschen was fired as a result. I discredit his testimony attributing antiunion remarks to Vaccarino and Barber. I am convinced that Paschen's testimony was distorted in an effort to characterize Respondent as an antiunion employer, motivated to weed out union applicants.

I credit Vaccarino and Barber who denied making statements regarding utilizing the PSI test as an instrument to eliminate Ogden employees. Vaccarino was a credible witness. I was impressed with his attention to details. Moreover, I find him to be specific and unambiguous in his testimony. I have already discussed Barber's credibility.

There is a dearth of evidence that the PSI test was utilized as a tool to eliminate Ogden applicants. In my view, utilization of the test for screening applicants was a perfectly legitimate business decision. Evidence reflects that Ogden employees actually fared better than the outside applicants. Moreover, the test was implemented systemwide. The unrefuted evidence is that Respondent desired to correct safe-

⁵ A recently opened \$15 million facility.

ty and theft problems. In that regard, according to Curtin's testimony, it proved successful.

I am convinced by the preponderance of the evidence, that Barber evaluated employees by first-hand observation. Furthermore, he considered recommendations by supervisors. These factors, combined with objective tests, gave Barber a basis to hire or reject an applicant. I conclude that the hiring process was nondiscriminatory.

Nor can Respondent be held responsible for not hiring individuals who did not apply, individuals who withdrew their applications, or people who did not comply with the application process,⁶ including the PSI test.

The decisions Respondent made not to hire employees who had been terminated by Ogden⁷ or any other employer, I find to be nondiscriminatory. Likewise, refusal to hire, based on poor recommendations, is within Respondent's province and not evidence of any discriminatory motivation.

Moreover, in the face of a good recommendation, Respondent, for whatever reason as long as it is nondiscriminatory, is entitled to reject an applicant. Gregg Walker is an example of an employee who falls within that category.

Respondent's compliment of employees never comprised a majority of former Ogden employees. Moreover, Respondent never received a demand letter from the Union, to recognize and bargain with it. Accordingly, Respondent was under no obligation to bargain with the Union over wages, hours, or working conditions for its employees.

Accordingly, I recommend that the complaint be dismissed in its entirety.

⁶For example, Richard Waters.

⁷Glenn Miller and Billy Allen.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit is:

All full-time and regular part-time dock agents and office agents employed by Respondent in Respondent's Chicago, Illinois area facilities, but excluding guards and supervisors as defined in the Act, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Respondent is not a successor to Ogden.

5. The allegations that Respondent has engaged in conduct violative of Section 8(a)(1), (3), and (5) of the Act have not been supported by substantial evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

It is recommended that the complaint be, and is, dismissed in its entirety.

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.